IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

(Chapter VIII, Rule 32(2) (b)

Description of Case

Criminal Appeal No. 616 of 2001
(Old No. 1981 of 1989)

Date of decision : 14th June, 2007

A.F.R. (Approved for Reporting)

~~Not approved for reporting~~

Date : 14.06.2007 Initials of Judge

Note : Bench Reader will attach this at the top of the first page of the judgment when it is put up before the Judge for signature.

HIGH COURT OF UTTARAKHAND, AT NAINITAL

Criminal Appeal No. 616 of 2001
(Old No. 1981 of 1989)

Shakti Singh
S/o Sri Kanhya Singh
R/o Village Nalai, P.S. Kalgikhal
Patti Patwal Syun,
Pauri Garhwal ...Appellant

Versus

State ... Respondent

Mr. Rajendra Kotiyal, Advocate for the appellant.
Mr. G.S. Sandhu, learned Govt. Advocate for the respondent-State.

Coram: Hon'ble Rajeev Gupta, C.J.
Hon'ble J. C. S. Rawat, J.

Per Hon'ble J.C.S. Rawat, J.

1. This appeal has been directed against the judgment and order dated 28.09.1989, passed by learned Sessions Judge, Pauri Garhwal in Sessions Trial No. 3 of 1988, whereby the appellant Shakti Singh has been convicted u/s 302 Indian Panel Code, 1860; (hereinafter as I.P.C.) & u/s 304-B I.P.C. and sentenced to imprisonment for life and seven years respectively.

2. The prosecution story, in brief, is that the father of the deceased had died in the year 1965. Deceased Basanti Devi daughter of Smt. Bindu Devi was married with the appellant Shakti Singh on 03-02-1984. The appellant Shakti Singh was employed in the Indian Army. Smt. Bhundra Devi was mother-in-law of the deceased; Smt. Dhanna Devi and Smt. Vidhata Devi were sisters-in-law (Bhabhi) of the appellant Shakti Singh and Smt. Sulochana was sister of the appellant Shakti Singh. On 22.10.1986 at about 10:00 a.m., two persons of Village Nalai came to the mother of the deceased and informed her that her daughter Smt. Basanti Devi has

committed suicide by hanging herself from a tree. After receiving the information about the death of the deceased, Smt. Bindu Devi alongwith her son Mohan Singh reached at village Nalai where they found Basanti Devi dead. It was also found by the Smt. Bindu Devi that there were burn as well as other bodily injuries on the person of the deceased. The Gram Pradhan had already informed Patwari vide Ex.Ka.3 that Smt. Basanti Devi has committed suicide by hanging herself from a Khinna tree. Pursuant to said report lodged by the Gram Pradhan about the suicide of the deceased, the patti patwari Rajendra Singh visited the spot, prepared the site plan and panchayatnama. He also prepared the necessary papers and sent the dead body for post mortem on 22.10.1986. The post mortem was conducted in District Hospital Pauri by Dr. Rajeev Hatwal. The Patwari did not lodge any report against the accused so the mother of the deceased submitted an application on 23.10.1986 Ex.Ka.1 to the S.D.M. concerned narrating the entire facts of the case. She also stated in her application that whenever her daughter used to come to her parental house she always complained about the torture and harassment meted out to her on account of dowry on the part of her husband and his other family members. Smt. Bindu Devi further stated in the application that she could not fulfill the demand of dowry of the husband & his family members so they committed murder of the deceased Basanti Devi. It was also alleged in the application that the deceased did not commit suicide but she was murdered by appellant Shakti Singh and his co-accused. On the application submitted by the informant Bindu Devi, the S.D.M. directed the Naib Tehsildar to investigate the matter. Thereafter, the Naib Tehsildar directed the Supervisor Kanoongo to register the case and investigate the

matter immediately. The Supervisor Kanoongo took the investigation in his hand and made the necessary endorsement in the G.D. On 25.10.1986, he took all the documents from the Patwari Rajendra Singh regarding the case of the deceased. The Investigating Officer after completing the necessary formalities of the investigation submitted the chargesheet Ex.Ka.12 before the court.

3. After submission of chargesheet, the accused were committed to the court of Sessions for trial and the trial court framed charges 147, 302/149 and 304-B I.P.C. against the accused. The accused denied the charges levelled against them and claimed their trial.

4. Prosecution in support of its case examined Bindu Devi PW1 complainant. She is the mother of the deceased Basanti Devi. She has stated that her daughter was married with accused Shakti Singh. She has narrated the entire story as unfolded from the application submitted by her to the S.D.M. on 23.10.1986. Mohan Singh PW2 is brother of the deceased Basanti Devi. He has corroborated the evidence of her mother Bindu Devi PW1. Dr. Rajeev Hatwal PW3 is Medical Officer who has conducted the autopsy on the dead body and proved post mortem report. Rajendra Singh, Patwari PW4 has proved F.I.R. and panchayatnama. Kali Ram PW5 is Investigating Officer who has investigated the matter. He has proved F.I.R. Ex.Ka.1 G.Ds. Ex.Ka.9 and Ka.10. He has later on handed over the investigation to Matber Singh PW6, who after completing the investigation submitted the chargesheet Ex.Ka.12.

5. The accused-appellants were examined u/s 313 Cr.P.C. and they have pleaded not guilty to the offence. They have stated that they have been falsely implicated in this case. The accused-appellants has further stated that he has been living with his wife, brothers and bhabhies in a joint family but the deceased Basanti Devi wanted to live separately. It was stated that he was serving in Army in remote area. His wife also wanted to live with him which was not possible for him. Due to this frustration, the deceased Basanti Devi has committed suicide. The accused did not adduce any oral and documentary evidence in their defence.

6. The learned Sessions Judge on appreciation of the evidence held accused-appellant Shakti Singh guilty u/s 302 & 304-B. I.P.C. The other accused Smt. Bhundra Devi, Smt. Dhanna Devi and Smt. Vidhata Devi were acquitted of the charges levelled against them.

7. We have heard Mr. Rajendra Kotiyal, learned counsel for the appellant; Mr. G.S. Sandhu, learned Government Advocate and perused the record carefully.

8. At the outset, it need to be mentioned here that it is not disputed that the deceased Basanti Devi wife of accused-appellant Shakti Singh died in the intervening night of 20/21-10.1986. According to accused-appellant Shakti Singh the deceased Basanti Devi had committed suicide by hanging herself from a tree. The prosecution has adduced the evidence of Dr.Rajeev Hatwal PW3 who has conducted the post mortem of deceased Basanti Devi on 24.10.1986 and found

the following ante mortem injuries on the body of the deceased Basanti Devi :-

1. *Bluish contusion all over the face.*
2. *clotted blood at the right ear or side.*
3. *Ligature mark around the neck, black in colour.*
4. *Burn injury wound 3 cm. x 3 cm. on the right shoulder.*
5. *3 cm. x ½ cm. x scalp deep just above right ear.*
6. 5 cm. x 5 cm. haematoma in between two central haemophilia.

Dr. Rajeev Hatwal PW3, Autopsy Surgeon has opined that the deceased died due to coma as a result of head injury. He has also proved post mortem report Ex.Ka.2. Thus there is no dispute about time, place and date of incident regarding the death of the deceased Smt. Basanti Devi.

9. Now we have to see who is responsible for death of the deceased Basanti Devi. There is no direct evidence to prove that accused-appellant Shakti Singh has committed murder of his wife Basanti Devi. The prosecution case rests upon circumstantial evidence. The law which is fairly settled about circumstantial evidence is that it should be such as to point out only to the guilt of the accused. The evidence should exclude all other hypothesis except the guilt of accused. It is often said that though witnesses may lie, circumstances will not but at the same time it must cautiously be scrutinized to see that the incriminating circumstances are such as to lead only to a hypothesis of guilt and reasonably exclude every possibility of innocence of the accused. In order to sustain conviction on circumstantial evidence, each of the incriminating piece of circumstantial evidence should be proved by cogent and reliable evidence and the court should be satisfied that the piece of evidence taken together forge

such a chain wherefrom no inference other than the guilt can be drawn.

10. The Hon'ble Apex Court in **Sharad Birdhichand Sarda Vs. State of Maharashtra (AIR 1984 SC 1622)** while dealing with circumstantial evidence has held that onus was on the prosecution to prove that the chain is complete. The conditions precedent before conviction could be based on circumstantial evidence were enumerated as under :-

(i) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned must or should and not may be established.

(ii) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;

(iii) the circumstances should be of a conclusive nature and tendency;

(iv) They should exclude every possible hypothesis except the one to be proved; and

(v) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.

The above decision has also been followed in the decisions of the Hon'ble Apex Court in **State of Rajasthan Vs. Rajaram 2003 Cri.L.J. p/3901, State of U.P. Vs. Satish 2005 SCC**

(Cri) 642 and Ram Singh Vs. Sonia & others 2007 (3) SCC 1.

11. Keeping in view of the above principle of law, we will consider the circumstances projected by the prosecution against accused-appellant.

12. The first circumstance projected by the prosecution is that whenever the deceased Basanti Devi used to go to her parental house, she used to tell her mother about the torture and harassment on account of dowry on the part of her husband and family members of her husband. The prosecution has adduced the evidence of Smt. Bindu Devi PW1, mother of the deceased Basanti Devi. She has stated in her evidence that the deceased Smt. Basanti Devi was married with the accused-appellant about two years before the incident. Whenever, the deceased used to come from her matrimonial house to her parental house, she used to complain to her mother that she was being tortured by her husband and other family members of her husband on account of non-providing sufficient dowry at the time of marriage and thereafter. She has further stated in her evidence that the matrimonial house of the deceased was about 10-12 kms. from her parental house. She has further stated in her deposition that the deceased Basanti Devi came to her parental house thrice after marriage and she had always complained to her about torture caused by her husband and in-laws with her. The prosecution has also adduced the evidence of Mohan Singh PW2 who is brother of the deceased Basanti Devi and son of Bindu Devi PW1. He has also corroborated the evidence of Bindu Devi PW1 that whenever her sister used to come to her parental house she

always complained about the torture and harassment meted out to her on account of demand of dowry on the part of her husband and family members of her husband. The evidence of Bindu Devi PW1 and Mohan Singh PW2 is credible and cogent. The defence could not elicit anything during the cross examination to discredit their testimony. Thus it is proved that the deceased Basanti Devi was subjected to torture and harassment prior to the incident.

13. The next circumstance that has been projected by the prosecution is that Bindu Devi PW1 has stated in her evidence that she received information that her daughter Basanti Devi has committed suicide by hanging herself from a khinna tree. Bindu Devi PW1 and Mohan Singh PW2 went to the matrimonial house of the deceased Basanti Devi. When Bindu Devi PW1 and Mohan Singh PW2 reached to the matrimonial house of the deceased Basanti Devi, they saw head injury and burn injury on the shoulder of the deceased apart from other injuries. Bindu Devi PW1 has further stated in her evidence that when she inquired about injuries on the person of the deceased from the co-accused & appellant they became annoyed and told her that she wanted to implicate them and threatened her. She also inquired about the injuries on her person from patwari but the patwari did not pay any heed to her query. The evidence of the prosecution on this point is totally credible and cogent. The evidence of PW1 Bindu Devi and PW2 Mohan Singh stands corroborated by the evidence of Dr. Rajeev Hatwal PW3 who conducted the autopsy on the body of the deceased. The doctor has found six ante mortem injuries on the person of the deceased which we have indicated in para 8 of our judgment. Dr. Rajeev Hatwal PW3 has categorically deposed before the Court that

death of the deceased was caused due to coma as a result of head injury. He has categorically ruled out the possibility of death of the deceased by hanging. He has further deposed that if death is caused by hanging, it is necessary that there would be fracture of the cartilage bone of the deceased. According to the post mortem report Ex.Ka.2, there was a clotted blood at the right ear orifice. Thus it is amply proved that there were fatal injuries on the person of the deceased prior to her death. If the deceased had committed suicide by hanging from a khinna tree, the death would have been caused by asphyxia. Thus the evidence of doctor and the post mortem report fully corroborated the circumstances that the deceased died due to the head injury sustained by her on her person before her death.

14. The next circumstance projected by the prosecution against the accused-appellant is that the deceased slept with the accused-appellant in the night. Thus she was last seen alive in the company of the accused-appellant. The accused-appellant has also admitted in his statement recorded u/s 313 Cr.P.C. that when he woke up in the morning, he did not find her wife Basanti Devi with him. Thereafter he made a thorough search of the deceased Basanti Devi. Later on, he found her hanging in the jungle from a khinna tree where the deceased had committed suicide. Now it is to be seen that the explanation put forward by the accused-appellant in whose company the deceased Basanti Devi was admittedly sleeping in the night of the incident was probable or not. It is amply established that there were ante mortem injuries on her body and she died due to the said ante mortem injuries. The prosecution has also led credible and cogent evidence of Bindu Devi PW1 and Mohan Singh PW2 that when they

reached to matrimonial house of the deceased they saw the body of the deceased and they found head injury and burn injury on her person apart from other injuries. The evidence of Bindu Devi PW1 and Mohan Singh PW2 is further corroborated by the evidence of Dr. Rajeev Hatawal PW3, Autopsy Surgeon and the post mortem report proved by him. It is amply proved from the facts and circumstances of this case that the deceased was hanged from a tree after causing fatal injuries on her person. Thereafter, the accused-appellant with a view to give it shape of suicide hanged the dead body of the deceased from a khinna tree. When the accused-appellant was asked u/s 313 Cr.P.C. that the deceased died due to the head injuries, he merely denied this fact. He was also put question u/s 313 Cr.P.C. that when the body of the deceased was inspected by the Patwari (I.O.) and the witnesses of the inquest report to prepare the inquest report, they found the head injury and burn injury on her person. The appellant simply denied this fact. The appellant has not put forward any explanation for the injuries found on the body of the deceased. Thus the explanation put forward by the accused-appellant is not reliable. The Hon'ble Apex Court in the case of **Joseph Versus State of Kerala (2000) 5 SCC p/197** has held as under **:-**

> "*14. The incriminating circumstances enumerated above unmistakably and inevitably lead to the guilt of the appellant and nothing has been highlighted or brought on record to make the facts proved or the circumstances established to be in any manner in consonance with the innocence at any rate of the appellant. During the time of questioning under Section 313 CrPC, the appellant instead of making*

at least an attempt to explain or clarify the incriminating circumstances inculpating him, and connecting him with the crime by his adamant attitude of total denial of everything when those circumstances were brought to his notice by the Court not only lost the opportunity but stood self-condemned. Such incriminating links of facts could, if at all, have been only explained by the appellant, and by nobody else, they being personally and exclusively within his knowledge. Of late, courts have, from the falsity of the defence plea and false answers given to court, when questioned, found the missing links to be supplied by such answers for completing the chain of incriminating circumstances necessary to connect the person concerned with the crime committed (see State of Maharashtra v. Suresh (2000) 1 SCC p/471). That missing link to connect the accused-appellant, we find in this case provided by the blunt and outright denial of every one and all the incriminating circumstances pointed out which, in our view, with sufficient and reasonable certainty on the facts proved, connect the accused with the death and the cause for the death of Gracy. For all the reasons stated supra, we have no hesitation to agree with the findings of the Division Bench of the High Court holding the appellant guilty of offences under Section 302 for committing the murder of Gracy and for robbing her of her jewellery worn by her – MOs 1 to 3, under Section 392. The deceased meekly went with the accused from the Convent on account of the misrepresentation made

that her mother was seriously ill and hospitalised apparently reposing faith and confidence in him in view of his close relationship – being the husband of her own sister, but the appellant seems to have not only betrayed the confidence reposed in him but also took advantage of the loneliness of the helpless woman. The quantum of punishment imposed is commensurate with the gravity of the charges held proved and calls for no interference in our hands, despite the fact that we are not agreeing with the High Court in respect of the findings relating to the charge under Section 376."

15. Thus the statement of the accused-appellant recorded u/s 313 Cr.P.C. being palpably false and there being cogent evidence adduced by the prosecution to show that accused-appellant has given a different version. The Court will have to proceed on the basis of the fact that accused-appellant had not explained inculpating circumstances established by the prosecution against him which would form an additional link in the chain of circumstances (See **Mani Kumar Thapa Vs. State of Sikkim (2002) 7 SCC p/157** and **State of Maharastra Vs. Suresh (2000) 1 SCC p/471).** It is also a relevant factor in the light of the above circumstances.

16. The next circumstance projected by the prosecution is that Gram Pradhan has submitted an application Ex.Ka.3 to patwari in which he has written that the deceased Basanti Devi has committed suicide by hanging from a khinna tree on 21.10.1986. It was further mentioned in the report that after thorough search, the dead body was found at about 4:00pm. Bindu Devi PW1 has stated in her evidence that when she

received the information about death of the deceased Basanti Devi by committing suicide, she alongwith Mohan Singh PW2 went to the matrimonial house of the deceased and found there that dead body of the deceased Basanti Devi was lying on the ground near about 100-150 paces from the house of accused-appellant. She has further stated that khinna tree was standing just nearby the place where dead body was lying on the ground. It is undisputed that the dead body of the deceased was traced at about 4:00p.m. on 21.10.1986. It is also the case of the defence that accused-appellant did not find the deceased asleep with him in the morning when he woke up. Undisputedly, the dead body remained hanging for a pretty long time from a khinna tree. The accused-appellant went to parental house of the deceased to trace her wife but he could not find the dead body till 4:00 p.m. which was hanging nearby. It is apparent if the deceased would have disappeared from his house, the family members of the accused-appellant would have made a thorough search in the nearby places where she could have been located or the dead body could have been find out. Thus this circumstance further corroborates the story of the prosecution.

17. Learned counsel for the appellant vehemently argued that the appellant could not be convicted u/s 302 I.P.C. (simpliciter) without the aid of section 149 I.P.C. in absence of substantive charge u/s 302 I.P.C.. Learned G.A. refuted the contention. Perusal of the charge reveals that the trial court has framed the following charges against the accused/appellant :-

> "That you on the night intervening 20/21.10.1986, some time about the mid night in village Nalali, Patti Patalsyun, District Pauri Garhwal, alongwith one Smt. Sulochana Devi were a member of an unlawful assembly

and in prosecution of the common object of such unlawful assembly, to wit to commit murder of Smt. Basanti Devi committed riot, and thereby committed an offence punishable u/s 147 Indian Penal Code and within the cognizance of this Court.

Secondly, that at the time and place mentioned above, in prosecution of the common object of such unlawful assembly, of which you were a member, murder of Smt. Basanti Devi was committed by members of the unlawful assembly and you knew that said offence is likely to be committed by the said unlawful assembly, and thereby committed an offence punishable under Section 302/149 of the Indian Penal Code and within the cognizance of this Court.

Thirdly, that at the above time and place, death of Smt. Basanti Devi was caused by burns or bodily injury, otherwise than under normal circumstances, within seven years of here marriage with accused Shakti Singh and it is shown that soon before death of Smt. Basanti Devi, she was subjected to cruelty or harassment by you and Smt. Sulochana Devi, beign husband and relatives of the husband of Smt. Basanti Devi, and thereby you willfully committed dowry death and thereby committed an offence punishable under Section 304 B of the Indian Penal Code and within the cognizance of this Court."

18. Now we have to consider as to whether the appellant could be convicted for murder and sentenced u/s 302 I.P.C. (simpliciter) when he was not charged with the substantive offence u/s 302 I.P.C. The learned Trial Court has acquitted the other co-accused of the charges of the offence u/s 302 r/w 149 I.P.C. Now the sole question remains for the consideration as to whether in the instant case there is no direct evidence against the accused/appellant that he has committed the offence of murder. The case rests on circumstantial evidence. As we have noticed earlier the circumstances conclude that it was the appellant who committed the murder of the deceased. Now we have to analyse in the facts and circumstances of this case, whether the accused-appellant could be convicted for the substantive offence of murder u/s 302 I.P.C. without the charge having been framed against him under that Section. This issue came

up for consideration before the Hon'ble Apex Court in the case of **Nanak Chand Vs. State of Punjab** reported in **AIR 1955 SC p/274** wherein the Hon'ble Apex Court has held that if the accused has been charged u/s 302 I.P.C. r/w 149 I.P.C. and no charge has been framed u/s 302, the said irregularity was not curable because the appellant was misled in his defence by the absence of a charge u/s 302. The court framed a charge u/s 302 r/w section 149 I.P.C. against the appellant. The Court did not frame the charge against the appellant for the offence of murder u/s 302 I.P.C. (simpliciter) and to convict him for murder and sentence him u/s 302 I.P.C. was to convict him of an offence with which he had not been charged. In defending himself the appellant was not called upon to meet such a charge and in his defence he may well have considered it unnecessary to concentrate on that part of the prosecution case. Thereafter, the matter came up before the Hon'ble Apex Court on several occasions and the view expressed by the Hon'ble Apex Court in the case of **Nanak Chand Supra** has been reiterated in the subsequent decisions. In the case of **Nallabothu Venkaiah Vs. State of A.P. reported in 2002 SCC (Cri) 1615** a similar question arose before the Hon'ble apex Court whether the appellant could be convicted under section 302 I.P.C. (simpliciter) without the aid of Section 149 in absence of the charge of Section 302 (simpliciter) and whether the appellant could be convicted under section 302/149 of selfsame evidence on the basis of which other accused has been acquitted. The Hon'ble Apex Court after relying upon earlier decisions on the point has held in paras 18, 19, 20, 21, 22, 23 and 24 as follows :

"18. In **Subran v. State of Kerala (1993) 3 SCC p/722** (deciding Review Petition No. 1394 of 1993) six

accused were arraigned for offences punishable under Sections 302, 324, 323, 341, 148 read with Section 149 IPC. Accused 1 Subran alone was convicted under Section 302 IPC (simpliciter) by the trial court and confirmed by the High Court on appeal. The three-Judge Bench of this Court reviewing it earlier judgment substituted paras 10 and 11 of the previous judgment as under:

> "Appellant 1 Subran, had rightly not been charged for the substantive offence of murder under Section 302 IPC. Subran, Appellant 1, was not attributed the fatal injury or identified as the person who caused the fatal blow. According to the medical evidence, none of the injures allegedly caused by appellant Subran either individually or taken collectively with the other injuries caused by him, were sufficient in the ordinary course of nature to cause death of Suku. There is no material on the record to show that the injuries inflicted by Subran, with the chopper, were inflicted with the intention to cause death of Suku. Under these circumstances, the conviction of the first appellant Subran, for an offence under Section 302 IPC simpliciter was neither desirable nor appropriate. The High Court, it appears, failed to consider the scope of clause (3) of Section 300 IPC in its proper perspective. In the facts of the present case, the intention to cause murder of Suku, deceased could not be attributed to the said appellant as the medical evidence also unmistakably shows that the injuries attributed to him were not sufficient in the ordinary course of nature to cause death of the deceased. Appellant 1 Subran, therefore, could not have convicted for the substantive offence under Section 302 IPC and his conviction for the said offence cannot be sustained. That Suku died as a result of cumulative effect of all the injuries inflicted on him b y all the four appellants stands established on the record. The question, therefore, arises what offence did the four appellants commit?"

19. In **Atmaram Zingaraji v. State of Maharashtra (1997) 7 SCC p/41** nine persons were arraigned as accused before the trial court under Sections 149/302/326 IPC. No other person, named or unnamed, is alleged to have participated in the crime. All the other 8 accused were acquitted by the High Court. However, the appellant was convicted under Section 302 IPC with the aid of Section 149. On appeal, this Court held:

> "6. In either of the above situations therefore the sole convict can be convicted under Section 302 IPC (simpliciter) only on proof of the fact that his individual act caused the death of the victim. To put it differently, he would be liable for his own act only. In the instant case, the evidence on record does not prove that the injuries inflicted by the appellant alone

caused the death; on the contrary the evidence of the eyewitnesses and the evidence of the doctor who held the post-mortem examination indicate that the deceased sustained injuries by other weapons also and his death was the outcome of all the injuries. The appellant, therefore, would be guilty of the offence under Section 326 IPC as he caused a grievous injury to the deceased with the aid of a jambia (a sharp-cutting instrument)."

20. In **Krishna Govind Patil v. State of Maharashtra AIR 1963 SC 1413** a four-Judge Bench of this Court has laid down that when four persons are tried on a specific accusation that only they committed a murder in furtherance of their common intention and three of them are acquitted, the fourth accused cannot be convicted with the aid of Section 34 IPC for the effect of law would be that those who were with him did not conjointly act with the fourth accused in committing the murder.

21. In **Nethala Pothuraju v. State of A.P. (1992) 1 SCC p/49** the appellant was called upon to face the trial along with other six accused for offences under Sections 149, 141, 34 and 302 IPC. The trial court convicted more than five persons under Section 302 read with Section 149 IPC. The High Court acquitted some of the accused resulting in reducing the number of the accused to less than five and thus rendered Section 149 inapplicable. On appeal this Court, having regard to the murderous attack by the appellant, as disclosed by the eyewitnesses and the number and nature of injuries sustained, converted the conviction as one under Section 302 read with Section 34 IPC.

22. In **Marachalil Pakku v. State of Madras AIR 1954 SC 648** seven accused were charged under Section 302 read with Section 149 IPC. The trial court convicted two appellants along with five others of having constituted an unlawful assembly and committed murder and they were convicted under Section 302 read with Section 149 IPC. The High Court, on appeal, gave benefit of doubt to five accused and acquitted them. In the appeal before this Court, it was argued that the said five accused having been acquitted and in the absence of a charge that five other unknown persons constituted an unlawful assembly, the two appellants could not be held members of the unlawful assembly which had the common object, the three-Judge Bench of this Court said:

"We have not been able to understand how the High Court could acquit these persons having held that the evidence of PWs 5 and 6 as to how Kannan was murdered by Accused 1 and 2 stabbing him and the others holding him by his hands and legs, was true. It also said that with regard to participation of Accused 3 to 7 they cold not say that the prosecution evidence was unreliable. On these findings, in our opinion, no scope was left for introducing into the

case the theory of the benefit of doubt. We think that Accused 3 to 7 were wrongfully acquitted. Though their acquittal stands, that circumstance cannot affect the conviction of the appellants under Section 302 read with Section 149 IPC."

23. In **Achhey Lal v. State of U.P. 6 (1978) 3 SCC p/526** as many as 15 named persons had taken part in the assault on the deceased. Fourteen accused had been acquitted by the High Court but the conviction and sentences awarded to the appellant by the Sessions Judge were upheld. This Court held that there is no finding by the High Court that after acquittal of the accused the unlawful assembly consisted of five persons or more, known or unknown, identified or unidentified, the provisions of Sections 149 and 147 cannot be invoked for convicting the sole accused as no individual act was assigned to him.

24. On an analytical reading of a catena of decisions of the Hon'ble Apex Court, the following broad proposition of law clearly emerges: (a) the conviction under Section 302 simpliciter without aid of Section 149 is permissible if overt act is attributed to the accused resulting in the fatal injury which is independently sufficient in the ordinary course of nature of cause the death of the deceased and is supported by medical evidence; (b) wrongful acquittal recorded by the High Court, even if it stood, that circumstances would not impede the conviction of the appellant under Section 302 read with Section 149 IPC; (c) charge under Section 302 with the aid of Section 149 could be converted into one under Section 302 read with Section 34 if the criminal act done by several persons less than five in number in furtherance of common intention is proved."

19. This matter again came up before the Hon'ble Apex Court in the case of **Sangam Lal Vs. State of U.P. 2006 (1) Crimes 67** wherein it has been held that where two accused were tried on charge u/s 302/34 I.P.C. but only one accused was convicted and other was acquitted. Neither it was in the prosecution case nor there was any evidence on record to show that it is the appellant who alone assaulted the deceased. The conviction of the sole convict cannot be sustained u/s 302 I.P.C. (simpliciter) and the conviction and sentence passed by the High Court was set aside and the appeal was allowed.

20. It is evident from the perusal of the above dicta of the Hon'ble Apex Court that a person who has not been charged

for the offence punishable u/s 302 I.P.C. (simpliciter) and the charge has been framed against the accused persons u/s 302 I.P.C. r/w 149 I.P.C., any such accused person cannot be convicted u/s 302 I.P.C. (simpliciter). The legal position as has been emerged from the judgments of the Hon'ble Apex Court is clear that the conviction u/s 302 (simpliciter) is only permissible if the overt act is attributed to the accused causing the injury independently sufficient in the ordinary course of nature to cause the death of the deceased and supported by the medical evidence. In the instant case, the case rests on the circumstances evidence. There is no direct evidence in this case. The second position which emerges from the above judgments is that if the acquittal of the co-accused has been recorded wrongly on the incorrect findings, the High Court has the power to set aside the findings and record conviction of the sole appellant with the aid of Section 149 I.P.C. Though the acquittal stood good, as the appeal has not been filed against the acquittal. In the instant case, it cannot be held that the trial court has taken a perverse finding to acquit the rest of the accused in the Sessions trial.

21. The incident took place on 21.10.1986 and now about 21 years has elapsed. At this distance of time, it would not be just and proper to direct the learned Sessions Judge to alter the charge and to proceed with the trial afresh against the appellant. In these circumstances, the accused cannot be convicted u/s 302 I.P.C. (simpliciter) as the trial court has not framed the independent and substantive charge u/s 302 I.P.C. (simpliciter) against the accused/appellant.

22. The learned Sessions Judge also convicted the appellant Shakti Singh u/s 304-B I.P.C. and sentenced him 7 years R.I. under this count. According to the prosecution, the incident

took place in the intervening night of 20/ 21st October, 1986 and the body of the deceased was found hanging from a Khinna tree at about 4:00 p.m. on 21.10.1986. Section 304-B was inserted by an amending Act No. 43 of 1986 and it was made enforceable w.e.f. 19.11.1986. It is apparent that the date when the incident took place, there was no offence punishable u/s 304-B I.P.C. under the Indian Penal Code, as such, the appellant Shakti Singh cannot be convicted u/s 304-B I.P.C.. Therefore, the appellant is entitled to be acquitted u/s 304-B I.P.C.

23. In view of the foregoing discussion, the appeal deserves to be allowed and is hereby allowed. The conviction and sentence awarded by the trial court in Sessions Trial No. 3 of 1988 against the appellant Shakti Singh is hereby set aside. The appellant is acquitted of the charges levelled against him.

24. Let the lower court record be sent back to the court concerned for compliance. Compliance report be submitted within three months from the date of receipt of order.

(J.C.S. Rawat, J.) (Rajeev Gupta, C.J.)

Dated 14th June, 2007
Shiv